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IN THE

Supreme Court of the United States

October Term 1972

No. 72 - 649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL, *Petitioners,*

v.

JOSE CISNEROS, ET AL, *Respondents.*

Petition For Rehearing Of Order On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL, Petitioners,

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PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This Court should reconsider and grant petitioners' Petition for Writ of Certiorari in this case and hear oral argument or remand the case to the Court of Appeals for further consideration in light of *Keyes v. School District No. 1*, No. 71-507, decided June 21, 1973, for two significant reasons not heretofore presented:

First, petitioners were and are entitled to a consideration and determination by the Fifth Circuit of the issue squarely presented to that court by petitioners' brief—whether the record contained evidence of intent to discriminate—which the court expressly declined to consider in its haste to deliver a pre-*Keyes* decision for reasons hereafter discussed; and

Second, petitioners have never been afforded an opportunity for oral presentation or explanation of their position to either appellate court which has written on the matter.

A CRITICAL ISSUE WAS PRESENTED TO BUT NOT PASSED UPON BY THE FIFTH CIRCUIT

The simple but crucial question heretofore ignored by this Court may be simply stated: Would this Court have refused to either review the opinion of the Fifth Circuit or to remand for further consideration if the Fifth Circuit had expressly held that the record contained no evidence of intent to discriminate and had nonetheless affirmed the judgment of the trial court?

One of petitioners' main points in their appeal as a matter of right to the United States Court of Appeals for the Fifth Circuit was the proposition

that the record was devoid of evidence of segregative intent. The Court of Appeals refused to consider the point based on its mistaken view (as illuminated by the subsequent decision in *Keyes*) that intent to segregate is not a "necessary ingredient of constitutional violations in the field of education." (Appendix, p. 130).

In *Keyes* this Court said:

> "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate."

What point was served in "emphasizing" the differentiating factor of intent or purpose if it was immaterial to the result? The statement was obviously not idle rhetoric. Much of this Court's decision in *Keyes* was entirely dependent on the distinction stated. The holding of the Fifth Circuit from which this petition emanates is in sharp contrast:

> "(The School District) urges, even if the imbalance could be traced to Board action, it does not fall within constitutional proscription because it has not acted with a discriminatory motive or purpose.

"We must also reject this type of continued meaningless use of de facto and de jure nomenclature to attempt to establish a kind of ethnic and racial separation of students in public schools that federal courts are powerless to remedy." (Appendix, p. 129).

* * *

"Discriminatory motive and purpose, while they may reinforce a finding of effective segregation, are not necessary ingredients of constitutional violations in the field of public education." (Appendix, p. 130).

* * *

"(The School Board) iterates that in the absence of a malevolent motive, de facto and not de jure segregation exists.

"While there is admittedly no catholicity of viewpoint in the Circuits on the question of intentional state action, this Court has never tempered its prohibition of school board actions that create, maintain, or foster segregation by the requirement that a discriminatory intent be shown." (Appendix, p. 132).

* * *

"The determination that no discriminatory purpose be shown (sic) *makes it unnecessary for us to consider whether the record reveals intentionally discriminatory Board action.*" (Appendix, p. 135, footnote 7; emphasis added).

The Fifth Circuit purported to recognize a third type of segregation, which is proscribed independent of and apart from the manner in which it came to be. The suggestion is one calculated to further confound the school districts throughout the country, or if the holding is not the law, then at least to visit a most unfortunate result on the Corpus Christi Independent School District:

"Thus, we discard the anodyne dichotomy of classical de facto and de jure segregation." (Appendix, p. 128).

* * *

"We therefore hold that the racial and ethnic segregation that exists in the Corpus Christi School system is unconstitutional —not de facto, not de jure, but unconstitutional." (Appendix p. 128).

The holding of the Court of Appeals is irreconcilable with this Court's disposition of the same issue in *Keyes*. If discriminatory purpose or intent is immaterial, as the Fifth Circuit has held, why

did this Court declare in *Keyes* that once it is established that there is intentional segregation in a segment of a school system "it is both fair and reasonable to require that the school authorities (in order to avoid district-wide desegregation requirements) bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent?"

If intent or purpose to segregate is not a necessary ingredient of unconstitutional segregation, what difference does it make whether the school authorities bear the burden which the Court has said they should? What purpose the language of this Court in *Keyes* that:

> "This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did."
>
> * * *
>
> "Thus, if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated conditions of the core city schools."

Why rebut the prima facie case if, in the words of the Fifth Circuit, the segregation, though not "de jure" is nonetheless "unconstitutional"?

There is no legal tenet of which petitioners are aware that would entitle this Court to deny relief on the *assumption* that if the lower courts followed the declarations of this Court in *Keyes* and reviewed the record for evidence of intent, the result below would be the same. The trial judge leaned heavily on statistical information to arrive at his conclusion that there was "unconstitutional segregation." (Appendix, p. 17, footnote 36; p. 29). But his keystone conclusion was that "this segregated and dual school district" had its "real roots in the minds of men"—but not in intentionally or purposefully segregating. Absolutely not! On the contrary, it was in "the failure of the school system to anticipate and correct the imbalance that was developing". (Appendix, p. 31). Failure to anticipate and correct imbalance that is developing is a far cry from the intentional or purposeful creation of that imbalance in the first instance, as discussed in *Keyes*.

On more than one occasion this Court has remanded a matter to the Court of Appeals for a determination of issues not passed on by that court. *E.g. United States v. Ballard*, 322 U.S. 78, 64 S.Ct.

882, 88 L.Ed. 1148 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 65 S. Ct. 235, 89 L.Ed. 187 (1944). Here the issue not passed upon by the Court of Appeals was whether there was evidence of intent or purpose to segregate. The 200,000 residents represented in this matter by the Corpus Christi Independent School District are entitled to an appellate determination — by this Court or by the Court of Appeals — as to whether the record contains evidence of intent or purpose to segregate. The question was properly preserved and petitioners will not have had their day in the appellate courts until the question has been squarely addressed and resolved.

PETITIONERS HAVE NOT BEEN BUT SHOULD BE PRESENTED AN OPPORTUNITY FOR ORAL PRESENTATION OF THE ISSUES ON APPEAL TO AT LEAST ONE APPELLATE COURT WHICH WRITES AN OPINION ON THE CASE.

At some point along the voyage of this case through the appellate channels, petitioners are entitled to an oral presentation of the issues and record evidence to the court which finally decides this case on the merits. Petitioners were never afforded such an opportunity for reasons which may have served the particular purpose of the Fifth Circuit but not of the litigants.

Oral presentation is especially important in this case, intimately involved as are the issues with the geography and growth of the City of Corpus Christi and the Corpus Christi Independent School District. The principal evidence consisted of large, ethnic distribution maps which graphically portrayed what petitioners cannot adequately describe or portray in written briefs but which are easy of presentation and understanding in oral argument. Oral presentation combined with use of the demonstrative evidence is the only means of effectively presenting the case. Such a presentation will establish two important points; first, the development of a high degree of segregation in residential areas at extreme ends of the District not caused by state action, and second, that construction of schools and student assignment as carried out by the School District was an intelligent approach to the geographic problems presented rather than the result of an intent to segregate.

Thus far, however, petitioners have not had their rightful day in the appellate courts. They have been shunted back and forth from the very beginning. The trial judge found in his partial final judgment at the conclusion of the first evidentiary hearing that there existed a basis for an interlocutory appeal to review major questions about which there was considerable doubt. (Appendix, pp. 51 - 52). The Fifth Circuit rejected the

attempted appeal. (Appendix p. 53). The trial judge thereupon ordered a desegregation plan into effect and a stay was granted. It was immediately vacated by the Fifth Circuit. (Appendix, p. 104). The action of the Fifth Circuit was only reversed by a petition to this Court. (Appendix, p. 104).

Petitioners then asked for an *en banc* hearing on the merits by the Fifth Circuit. The request was refused. (Appendix, p. 106). Accordingly, oral argument was to a three judge panel rather than to the fifteen justices who participated in the eventual, fragmented merits opinion. Petitioners were later advised that a decision on the merits would be withheld "pending a decision of the Supreme Court of the United States" — obviously *Keyes*. (Appendix, p. 117). Then, shortly before this court heard oral argument in *Keyes* and with no explanation of the two about-faces, the Fifth Circuit did write an *en banc* opinion and it wrote the opinion without awaiting the decision of the Supreme Court. Without regard to the confusion attendant to its precipitous and unannounced advent, the opinion did little by way of clearly explaining to petitioners exactly what their transgression had been. The majority opinion was written by only eight of the fifteen judges. Some joined or concurred in the first part of the opinion, some in the last, some in neither, and some still felt that the court should have done what it originally said it

would do, await the opinion in *Keyes v. School District No. 1.*

It is difficult to infer that the Fifth Circuit's decisions to write *en banc* and before *Keyes* were conceived primarily to resolve the problems of the Corpus Christi Independent School District. Given the procedural background, reasonable minds could conclude that the fragmented Fifth Circuit was moved to render an advisory opinion to the Supreme Court of the United States. Judges are human and the Fifth Circuit has long sat in consideration of the difficult progeny spawned by *Brown I* while other circuits in the northern and western states where segregation has never been mandated by state law have comfortably but firmly held, time and again, that segregation flowing from other causes than intent to segregate results in no constitutional violation. It is little wonder then — but not necessarily dispensation of justice to petitioners — that when presented with this case, the only case ever to be considered by them which did not involve statutorily required segregation, and given the knowledge that this Court would write soon on the subject, the Fifth Circuit should seize upon Corpus Christi as an unwilling and unfortunate vehicle in which to carry its views to the Supreme Court.

It was not the ideal case for the Fifth Circuit's

purpose. The bases for the trial court's conclusions were hazy at best and in some cases completely contradictory. But it was the only available opportunity. And so, with a peremptory reversal of the original denial to hear the case *en banc* and an ill-advised abandonment of the original decision to await *Keyes*, the fragmented court made Corpus Christi its unwilling and unfortunate messenger, directed to carry to this Court the view of eight of fifteen judges of the Fifth Circuit that without regard to antecedent intent, this or any other school district should be required to "desegregate" not because there was *de jure* segregation, not because there was *de facto* segregation, but because there was "*unconstitutional*" segregation.

Even had it wanted to hang its merits-opinion-hat on the peg of segregative intent, the Fifth Circuit could not have done so, nor should this Court assume automatically that the Fifth Circuit would find segregative intent if the case is remanded as it should be. The trial judge's decision is replete with comments which reveal the mistaken view that segregation from whatever cause is "unconstitutional." Although he was supposed to be questing for evidence of discriminatory intent, he castigated the School District time and again for its failure to affirmatively integrate Mexican-Americans and Anglo-Americans. He found in the failure to act affirmatively in response to a violation

not yet found to exist, conduct which he concluded was unconstitutional — a prime example of circular reasoning. As petitioners have previously pointed out, there was no duty to act affirmatively until there was found to have been a constitutional violation. The trial court leaned most heavily on statistical evidence of segregation in fact. (Appendix, p. 17, footnote 36; p. 29). But his moment of truth lay in his observation that the "segregated and dual school district" had its "real roots in the minds of men". (Appendix, p. 31). Though this language might be suggestive of intent, he dispelled the possibility of such an inference by specifically identifying the process in "the minds of men" to which he referred as "failure of the school system to anticipate and correct the imbalance that *was developing*". (Appendix p. 31). Had there been evidence of intent to segregate as opposed to mere segregation in fact, it would have been a simple matter for the court to have so found. That he did not speaks volumes to the points petitioners here urge — that there was no evidence of intent to segregate, and that the Fifth Circuit should review the question presented to and side-stepped by them to petitioners' extreme detriment.

Confronted with such a holding, the Fifth Circuit had several alternatives. It could simply hold that absent intent there was no constitutional

violation. But this would not get that court's message to this Court. Accordingly, it refused to pass on the existence *vel non* of evidence of intent and discarded the requirement of intent entirely. By so doing it created a conflict with the decisions of Courts of Appeal for northern and western circuits. It acknowledged that fact (Appendix p. 132) and Corpus Christi became the pawn.

In this Court petitioners have once again been met with a divided refusal to consider their contentions on the basis of a full-scale review. Allusion has already been made to the proposition that oral argument here would clearly demonstrate the simple truth of the District's position: that given the growth, residential patterns, continuing population shifts, and the unique geography of the city, the School District had only two alternatives. It could either treat all of its children alike, assigning them impartially to neighborhood schools with whatever segregation was unintentionally attendant thereto, or it could proclaim its Anglo- and Mexican-American children different from one another and assign them to schools by gerrymandering boundaries (which would accomplish little intermixing in many areas), transporting them past closer schools to others more distant, or by adopting some other bizarre method of student assignment.

Now this Court has decided that the District should not have the right to make an oral presentation which it was never afforded in the Court of Appeals and has concluded, five to four, that it should not have the right to a review of the evidence-of-intent issues presented to but not passed upon by either this Court or the Court of Appeals.

Petitioners sincerely believe that the law as announced by the Fifth Circuit below conflicts with this Court's language in *Keyes*. The conflict is one which is irreconcilable and unexplainable when examined in the light of the evidence upon which the Fifth Circuit refused to pass. It is the type of conflict which, in itself, has many times been held a valid basis for review here. *Egan v. City of Aurora*, 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed.2d 741 (1961); *Pure Oil Co. v. Suarez*, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966). The oral argument which petitioners seek can and will reveal to the Court the error which has been committed.

It is doubtful that any other case of the import of this one to the 200,000 citizens of Corpus Christi has been disposed of by the federal appellate courts in like manner. Corpus Christi should not have been used as a veritable trial balloon. This Court should reconsider, grant the Petition for Writ of Certiorari, and either afford the oral

argument attendant thereto or remand the case to the Fifth Circuit for consideration in light of *Keyes v. School District No. 1* as many of the judges of both this Court and of the Court of Appeals felt should be done.

CONCLUSION

For the reasons set forth above, petitioners respectfully urge that this Petition for Rehearing be favorably ruled upon by this Court, and that their petition for Writ of Certiorari be granted, to be followed by oral argument before this Court or by a summary reversal and remand to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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RULE 58 CERTIFICATE AND CERTIFICATE OF SERVICE

I, Richard A. Hall, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay, and that the Petition for Rehearing is restricted to substantial grounds available to petitioners although not previously presented.

I further certify that on July 19, 1973, three copies of the foregoing Petition for Rehearing were served upon each party of record by depositing each set of copies in a United States Post Office, with air mail postage prepaid, properly addressed to counsel of record as follows:

Mr. James P. Wolf, Dixie, Wolf & Hall, and Mr. James DeAnda, Attorneys for Respondents, 609 Fannin Street Building—Suite 401, Fannin Street at Texas Avenue, Houston, Texas 77002;

Hon. Elliot Richardson, Attorney General of the United States, United States Department of Justice, Washingon, D. C. 20530.

Hon. Erwin Griswold, Solicitor General of the United States, United States Department of Justice, Washingon, D. C. 20530.

Richard A. Hall